A

Prestij Mega Construction Sdn Bhd v Personal Representative of Estate of Vinayak Pradhan Prabhakar (deceased) & Ors and other cases

B

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NOS BA-24C-13–02 OF 2020, BA-24C-25–03 OF 2020, BA-24C-15–02 OF 2020 AND BA-24C-54–06 OF 2020

WONG KIAN KHEONG J

C

20 JANUARY 2021

Building and Construction Law — Adjudication — Adjudication decision — Setting aside — Appointment of adjudicator — Challenge against validity of

D

appointment — Whether former director of AIAC had power to appoint adjudicators — Whether subsequent adjudication decisions of adjudicators valid — Whether adjudication decisions could be enforced — Whether director of AIAC had immunity — Whether the adjudicators had jurisdiction to adjudicate proceedings — Construction Industry Payment and Adjudication Act 2012 ss 2 &

E

3 — Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 reg 3A(2) — Diplomatic Privileges (Vienna Convention) Act 1966 s 3(1)

F

Civil Procedure — Originating summons — Striking out — Application for — Challenge against validity of appointment of adjudicator — Whether challenge ought to be by way of judicial review instead of originating summons — Whether solicitors should pay costs of proceedings — Whether the originating summons was frivolous, vexatious and an abuse of court process

G

Constitutional Law — Judicial power — Jurisdiction — Government of Malaysia entered into host country agreement with international governmental organisation — Whether High Court has jurisdiction to determine matters

H

involving sovereign states — Whether High Court has power to enforce treaty — Federal Constitution art 121(1)

Jurisdiction — Courts — Powers and jurisdiction — Whether acting director/director AIAC of immune from legal proceedings for appointments of

I

adjudicators done in capacity as acting director/director of AIAC — Whether Fortuna injunction should be granted

This was the plaintiff's two applications to obtain a declaration that the appointment of the acting director of the Asian International Arbitration

Centre ('AIAC') was terminated, for two adjudication decisions to be set aside, and for a fortuna injunction to be granted in favour of the plaintiff ('Prestij's OS') which was heard together with the applications by the defendants in Prestij's OS for leave of court to enforce the adjudication decisions ('the enforcement OS'). In 1978, the Malaysian Government ('government') entered into a host country agreement ('the HCA 1978') with the Asian-African Legal Consultative Committee ('AALCC'). AALCC had changed its name in 2001 to Asian-African Legal Consultative Organization ('AALCO'). The HCA 1978 established the Kuala Lumpur Regional Centre for Arbitration ('KLRCA'). The HCA 1978 was renewed by the government and AALCO in 2013 ('the HCA 2013'). In 2018, a supplementary agreement to the HCA 2013 was concluded by the government and AALCO. KLRCA was then named as the AIAC. On 21 November 2018, Mr Vinayak Prabhakar Pradhan ('Mr Pradhan') was appointed by the government as AIAC's acting director. The government subsequently confirmed Mr Pradhan's appointment as AIAC's director on 8 May 2019. Pursuant to ss 21(b) and 23(1) of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'), Mr Pradhan appointed: (a) Mr Loh Charn Yung to adjudicate an adjudication claim ('AC') by Quzen Sdn Bhd ('Quzen') against Prestij Mega Construction Sdn Bhd ('Prestij'); and (b) Dr Wendy Ooi Su Ghee to adjudicate an AC by PME Power Engineering Sdn Bhd ('PME') against Prestij. The two adjudicators adjudicated against Prestij in both ACs ('the adjudication decisions'). Subsequently, by way of a letter dated 20 November 2019 from AALCO, Mr Pradhan's appointment as acting director was terminated with effect from 8 May 2019. Prestij therefore file dan originating summons ('OS') against Mr Pradhan and Quzen and an OS against Mr Pradhan and PME ('Prestij's OS '). Since Mr Pradhan had passed on, the personal representative of Mr Pradhan's estate ('Mr Pradhan's representative') was ordered by the court to be a substitute for Mr Pradhan in Prestij's OS. Prestij also obtained leave of court to join the government as the third defendant in Prestij's OS. In Prestij's OS, Prestij prayed, among others, for: (i) a declaration that Mr Pradhan's appointment as acting director had been terminated by AALCO 'immediately' on 8 May 2019; (ii) a declaration that Mr Pradhan was not the acting director after 8 May 2019; (iii) the adjudication decisions be set aside; and (iv) a fortuna injunction to be granted to restrain Quzen from filing and serving a winding up petition against Prestij based on the adjudication decision. Mr Pradhan's representative applied in Prestij's OS for: (A) a declaration that the court had no jurisdiction over Mr Pradhan with regard to the claims and/or relief applied for in Prestij's OS; (B) the court to strike out Prestij's OS; and (C) the costs for the applications to be paid by Prestij's solicitors to Mr Pradhan's representative on an indemnity basis. The issues that arose for determination were: (1) whether the court had 'jurisdiction' and/or 'power' within the meaning of art 121(1) of the Federal Constitution ('the FC') to implement and/or enforce the HCA 2013; (2) whether the HCA 2013 could be enforced by the court when the HCA 2013 had not been enacted by the legislature as an Act of Parliament

('AP'); (3) whether Mr Pradhan had immunity against Prestij's OS under s 34(1) of the CIPAA; and/or reg 3A(2) of the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 ('the KLRCAR') read with s 3(1) of the Diplomatic Privileges (Vienna Convention) Act 1966 ('the DPA') and article 31.1 of the Schedule to the DPA; (4) whether Prestij had adduced any evidence to rebut four rebuttable presumptions under s 114(e) of the Evidence Act 1950 ('the EA') that: (I) the Government had 'regularly' appointed Mr Pradhan, first as acting director and subsequently as director ('Mr Pradhan's appointments'); and (II) Mr Pradhan had 'regularly' appointed the two adjudicators; (5) if there were defects in Mr Pradhan's appointments, whether such defects invalidate Mr Pradhan's appointment of the two adjudicators according to s 41(a) of the Interpretation Acts 1948 and 1967 ('the IA'); (6) whether if the court had jurisdiction and power to decide on the validity of Mr Pradhan's appointments, Prestij's OS could circumvent: (I) the mandatory requirement for leave of court to file a judicial review application as stipulated in O 53 r 3(1) of the Rules of Court 2012 ('the RC'); and (II) the mandatory three-month time period to file a judicial review application as provided in O 53 r 3(6) of the RC and the need to obtain court's leave under O 53 r 3(7) of the RC if the limitation period had been exceeded; (7) whether the court could grant the declarations applied for in Prestij's OS under s 41 of the Specific Relief Act 1950 ('the SRA'); (8) if the court struck out Prestij's OS, whether the court should exercise its discretion to order Prestij or Prestij's solicitors to pay costs to Mr Pradhan's representative on an indemnity basis pursuant to O 28 r 3B(1)(h) and (4) read with O 59 r 16(2) and (4) of the RC; (9) whether the two adjudicators had jurisdiction under CIPAA to adjudicate the adjudication proceedings; (10) whether the adjudicators exceeded their jurisdiction within the meaning of s 15(d) read with s 27(1) of the CIPAA; (11) whether the adjudicators had breached the second rule of natural justice (second rule) as understood in ss 15(b) and 24(c) of the CIPAA; (12) whether the court should exercise its discretionary power under ss 50 and 51(2) of the SRA to grant Prestij's fortuna injunction application; and (13) whether the court should grant leave under s 28(2) of the CIPAA for the two adjudication decisions to be enforced against Prestij.

Held, allowing applications of Mr Prandhan's representative with costs to be paid by Prestij on an indemnity basis to Mr Pradhan's representative; dismissing Prestij's OS with costs; allowing enforcement OS with costs:

(1) The High Court has neither 'jurisdiction' nor 'power' under art 121(1) of the FC to implement and/or enforce the HCA 2013 because: (a) there was no 'federal law' (as defined in art 160(2) of the FC) which has conferred 'jurisdiction' and 'power' on the court to execute and/or enforce the HCA 2013; (b) the power to implement and enforce any treaty is vested in the government (not state government) and Parliament (not the state legislative assembly); and (c) cases have clearly decided that

the court does not have any power to enforce any matter regarding sovereign states. Therefore, the court could not enforce the HCA 2013 in any manner (see paras 18–19).

(2) It was trite law that any treaty signed, acceded to or ratified by the government could only be enforced in Malaysia if Parliament had passed an Act of Parliament ('AP') which implemented that treaty. As the Parliament had not passed any AP which implemented the HCA 2013, the HCA 2013 could not, therefore, be enforced by our courts as part of our Malaysian law. Hence, no reliance could be placed on the HCA 2013 in Prestij's OS (see paras 20–21).

(3) Section 114(e) of the EA provides a rebuttable presumption that Mr Pradhan had acted 'regularly' when he appointed the two adjudicators. Consequently, Prestij had the onus under s 4(1) read with s 114(e) of the EA to prove that Mr Pradhan had not acted 'regularly' or had not acted in good faith in his appointment of the two adjudicators. Mr Pradhan's representative could rely on s 34(1) of the CIPAA for immunity because: (a) Mr Pradhan's appointment of the two adjudicators was done in his performance of his functions as the director under ss 21(b) and 23(1) of the CIPAA; and (b) no evidence had been adduced by Prestij to prove on a balance of probabilities that Mr Pradhan had acted dishonestly when he appointed the two adjudicators. Further, Prestij had not discharged the burden to prove on a balance of probabilities that Mr Pradhan had acted dishonestly or had not acted in good faith when he appointed the two adjudicators. It was not disputed that Mr Pradhan was acting as AIAC's 'high officer' as understood in reg 1A of the KLRCAR when he appointed the two adjudicators. With regard to Mr Pradhan's appointment of the two adjudicators, Mr Pradhan's representative was entitled to rely on immunity granted to Mr Pradhan pursuant to reg 3A(2) of the KLRCAR read with s 3(1) of the DPA and article 31.1 of the Schedule to the DPA (see paras 28–29 & 34–35).

(4) In view of s 4(1) of the EA, Prestij bore the burden to rebut the rebuttable presumptions on a balance of probabilities. Prestij had not adduced any evidence to show that Mr Pradhan had not been 'regularly' appointed by the government as the acting director and director. Nor was there any evidence to show that Mr Pradhan had not 'regularly' appointed the two adjudicators. Prestij had not succeeded to discharge the onus to rebut the rebuttable presumptions on a balance of probabilities. Even if it is assumed that there were defects in Mr Pradhan's appointments, by reason of s 41(a) of the IA, such defects could not invalidate Mr Pradhan's appointment of the adjudicators (see paras 37–38 & 40).

(5) The government's appointments of Mr Pradhan as the acting director and director had sufficient elements of public law for which Prestij

should have filed a judicial review application. It was clear that Prestij was 'adversely affected' by Mr Pradhan's appointments of the adjudicators ('appointments') within the meaning of O 53 r 2(4) of the RC. Hence, Prestij had the threshold locus standi to file a judicial review application for a certiorari order to quash Mr Pradhan's appointments. Instead of filing a judicial review application to quash Mr Pradhan's appointments, Prestij's OS was filed which circumvented the mandatory requirements for a judicial review application whereby: (a) Prestij had unlawfully bypassed O 53 r 3(1) of the RC which required Prestij to obtain leave of court before Prestij could file a judicial review application; and (b) Prestij should have applied to court under O 53 r 3(7) of the RC for an extension of time to file a judicial review application since the three-month limitation period as stipulated in O 53 r 3(6) of the RC had long passed in respect of Mr Pradhan's appointments of the adjudicators. This was however not done by Prestij. In view of Prestij's circumvention of the mandatory requirements for a judicial review application, Prestij's OS constituted abuses of court process (see paras 42–45).

(6) Since this court had no jurisdiction over Mr Pradhan with respect to the relief sought in Prestij's OS, the court granted the declarations prayed for in Mr Pradhan's representative's application pursuant to O 28 r 3B(1)(g) of the RC. Prestij's OS against Mr Pradhan's representative were frivolous and/or vexatious and/or constituted abuses of court process and was struck out under: (a) O 18 r 19(1)(d) read with (3) of the RC; (b) O 92 r 4 of the RC; and/or (c) the court's inherent jurisdiction and/or power (see paras 50–51).

(7) Pursuant to O 59 r 6(1)(c) of the RC, the court had a discretion to order the solicitors of any party to pay costs to the opposing party. However, the court did not exercise the discretion under O 59 r 6(1)(c) of the RC to order Prestij's solicitors to indemnify the costs of Mr Pradhan's representative because: (a) the costs of this case had not been incurred improperly or without reasonable cause by Prestij's solicitors; (b) costs of Prestij's OS had not been wasted by undue delay caused by Prestij's solicitors; and (c) Prestij's solicitors did not commit any misconduct or default which had wasted costs of this case. This was an exceptional case for the court to exercise discretion to order Prestij to pay costs to Mr Pradhan's representative on an indemnity basis for reasons that: (i) at the first case management of Prestij's OS, Mr Pradhan's counsel had informed the court and Prestij's counsel that Mr Pradhan would abide by any decision which would be made by the court ('Mr Pradhan's concession'). In view of Mr Pradhan's concession, there was no necessity for Prestij's OS to be continued against Mr Pradhan. However, despite Mr Pradhan's Concession, Prestij's OS against Mr Pradhan were not discontinued; and (ii) when Mr Pradhan passed on, Mr Pradhan's learned counsel again asked Prestij to reconsider Mr Pradhan's concession. If

Prestij had accepted Mr Pradhan's Concession, Mr Pradhan's representative need not be ordered by the court to be a substitute for Mr Pradhan in Prestij's OS (see paras 54–55 & 59).

(8) The two adjudicators had jurisdiction to adjudicate the adjudication proceedings because, inter alia: (a) all the requirements stipulated in s 2 of the CIPAA had been fulfilled with regard to the adjudication proceedings; (b) the circumstances stated in s 3 of the CIPAA did not apply to the adjudication proceedings; and (c) Prestij, Quzen, PME and the two subcontracts had not been exempted from the application of the CIPAA under s 40 of the CIPAA by the minister of works. Prestij could not rely on the two errors to deprive the adjudicators of their jurisdiction to adjudicate the two AC's because: (i) the contents of the two PC's had sufficient details to disclose valid causes of action which Quzen and PME had against Prestij; (ii) the two subcontracts had provided for the application of the PAM contract. In other words, the PAM contract applied to Prestij, Quzen and PME. The two errors merely concerned the wrong provision of the PAM Contract which was applicable in the two PC's; and (iii) Prestij was not prejudiced in any manner by the two errors (see paras 63 & 65).

(9) By reason of s 27(1) of the CIPAA, the jurisdiction of the adjudicators to adjudicate the adjudication proceedings was limited to matters raised in: (a) the two PC's; and (b) the two payment responses ('PR's'). In this case, the adjudicators had not exceeded their jurisdiction because they did not decide on any matter beyond the two payment claims ('PC') or two PR's. Accordingly, there was no basis for this court to set aside the two adjudication decisions under s 15(d) read with s 27(1) of the CIPAA (see paras 66–67).

(10) Upon perusal of the two PR's and two AR's and based on the two adjudication decisions, the adjudicators had considered in essence all the defences raised by Prestij in the two adjudication proceedings. Before the delivery of the adjudication decisions, the adjudicators had not deprived Prestij of its right to adduce any evidence and to submit on all the questions which arose in the adjudication proceedings. The two adjudicators had not breached the second rule within the meaning of ss 15(b) and 24(c) of the CIPAA. The court was not inclined to set aside the adjudication decisions pursuant to s 15(b) of the CIPAA, and thus allowed the two enforcement OS (see paras 70–72 & 83).

(11) The court had a discretion under ss 50 and 51(2) of the SRA to grant Prestij's fortuna injunction application. The court was not able to allow Prestij's fortuna injunction application as: (a) Quzen was a 'creditor' of Prestij within the meaning of s 464(1)(b) of the Companies Act 2016 and was thereby entitled to present a winding up petition against Prestij under s 465(1)(e) of the Companies Act 2016; and (b) Quzen's exercise of

A its statutory rights under ss 464(1)(b) and 465(1)(e) of the Companies Act 2016 could not amount to an abuse of court process (see paras 78–79).

[Bahasa Malaysia summary

B Ini adalah dua permohonan di bawah saman pemula plaintif untuk mendapatkan perintah bahawa pelantikan pemangku pengarah Pusat Timbang Tara Antarabangsa Asia ('AIAC') telah ditamatkan, untuk dua keputusan adjudikasi diketepikan, dan bagi injunksi fortuna memihak kepada plaintif ('SP Prestij') yang didengar bersama dengan permohonan oleh C defendan-defendan dalam SP Prestij untuk memohon kepada mahkamah untuk melaksanakan keputusan adjudikasi ('perlaksanaan SP'). Pada tahun 1978, Kerajaan Malaysia telah memeterai perjanjian tuan rumah ('HCA 1978') dengan Jawatankuasa Perundingan Undang-Undang Asia-Afrika ('AALCC'). AALCC telahpun menukar namanya pada tahun 2001 kepada D Pertubuhan Perundingan Undang-Undang Asia-Afrika ('AALCO'). HCA 1978 telah menubuhkan Pusat Timbang Tara Serantau Kuala Lumpur. HCA 1978 telah diperbaharui oleh kerajaan dan AALCO pada tahun 2013 ('HCA 2013'). Pada tahun 2018, perjanjian tambahan kepada HCA 2013 tersebetu telah dimuktamadkan oleh kerajaan dan AALCO. KLRCA kemudiannya E dinamakan sebagai AIAC. Pada 21 November 2018, Encik Vinayak Prabhakar Pradhan ('Pradhan') telah dilantik oleh pemangku, Pradhan sebagai pemangku Pengarah AIAC. Kerajaan kemudiannya mengesahkan pelantikan Pradhan sebagai ahli AIAC pada 8 Mei 2019. Menurut peruntukan ss 21(b) dan 23(1) Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAPIP'), F Pradhan melantik: (a) Loh Charn Yung untuk menilai tuntutan adjudikasi ('AC') oleh Quzen Sdn Bhd ('Quzen') terhadap Prestij Mega Construction Sdn Bhd ('Prestij'); dan (b) Dr Wendy Ooi Su Ghee untuk mengadjudikasi AC oleh PME Power Engineering Sdn Bhd ('PME') dan Prestij. Kedua-dua adjudikator tersebut mengadjudikasi kedua-dua AC Prestij ('keputusan adjudikasi'). G Seterusnya, surat bertarikh 20 November 2019 daripada AALCO, pelantikan Pradhan sebagai ketua pegawai eksekutif (ADI) telah ditamatkan berkuat kuasa 8 Mei 2019. Oleh itu, Prestij telah memfailkan saman pemula ('SP') terhadap Pradhan dan Quzen dan saman pemula terhadap Pradhan dan PME ('SP Prestij'). Sejak Pradhan meninggal dunia, pentadbir harta Encik Pradhan H (pentadbir harta Pradhan') telah diperintahkan oleh mahkamah untuk menjadi pengganti Pradhan di dalam SP Prestij. Prestij juga mendapat kebenaran mahkamah untuk memasukkan kerajaan sebagai defendan ketiga di dalam SP Prestij. Di dalam SP Prestij, Prestij memohon, antara yang lain: (i) satu deklarasi bahawa pelantikan Pradhan sebagai pemangku pengarah telah I ditamatkan oleh AALCO 'serta-merta' pada 8 Mei 2019; (ii) perisytiharan bahawa Pradhan bukanlah seorang yang sah selepas 8 Mei 2019; (iii) keputusan adjudikasi diketepikan; dan (iv) injunksi fortuna yang akan diberikan untuk menghalang Quzen daripada memfailkan petisyen penggulungan terhadap Prestij berdasarkan keputusan adjudikasi. Pentadbir

harta Pradhan memohon di dalam SP Prestij untuk: (A) perisytiharan bahawa mahkamah tidak mempunyai bidang kuasa ke atas Pradhan berkenaan dengan tuntutan seperti yang dipohon; (B) mahkamah membatalkan SP Prestij; dan (C) kos bagi peguam bela Prestij kepadar pentadbir harta Pradhan atas dasar ganti rugi. Isu-isu yang timbul adalah: (1) sama ada mahkamah mempunyai had 'bidang kuasa' dan/atau 'kuasa' di dalam perkara 121(1) Perlembagaan Persekutuan ('PP') untuk melaksanakan HCA 2013; (2) sama ada HCA 2013 boleh dikuatkuasakan oleh mahkamah apabila HCA 2013 tidak digubal oleh badan perundangan sebagai Akta Parlimen ('AP'); (3) sama ada Pradhan mempunyai imuniti terhadap SP Prestij di bawah s 34(1) APAPIP; dan/atau perkara 3A(2) Peraturan-Peraturan Pusat Timbang Tara Serantau Kuala Lumpur (Keistimewaan dan Imuniti) 1996 ('KLRCAR') dibaca bersama s 3(1) Akta Hak Keistimewaan Diplomatik (Konvensyen Vienna) 1966 ('DPA') dan perenggan 31.1 Jadual DPA; (4) sama ada Prestij menambah keterangan untuk pembelaan terhadap empat anggapan di bawah s 114(e) Akta Keterangan 1950 ('AK') bahawa: (I) Kerajaan telah 'dengan betul' melantik Encik Pradhan sebagai pemangku pengarah dan seterusnya sebagai pengarah ('perlantikan Pradhan'); dan (II) Pradhan telah 'dengan betul' melantik kedua-dua adjudikator; (5) sekiranya terdapat kesilapan di dalam perlantikan Pradhan, sama ada kesilapan tersebut membatalkan keputusan Pradhan bagi perlantikan kedua-dua adjudikator tersebut menurut s 41(a) Akta Tafsiran 1948 dan 1967 ('IA'); (6) sama ada mahkamah mempunyai bidang kuasa untuk memutuskan keesahan perlantikan Pradhan, SP Prestij's memohon: (I) keperluan mandatori untuk meminta kebenaran mahkamah untuk memfailkan semakan kehakiman menurut dalam A 53 k 3(1) KKM 2021; dan (II) tempoh masa mandatori tiga bulan untuk memfailkan permohonan semakan kehakiman di dalam A 53 k 3(6) KKM 2012 dan keperluan untuk mendapatkan kebenaran mahkamah di bawah A 53 k 7(3); (7) sama ada mahkamah boleh memberikan perkara yang dipohon yang dipohon dalam SP Prestij di bawah S 41 Akta Spesifik Relief 1950 ('ASR'); (8) jika mahkamah membuat keputusan, sama ada mahkamah perlu menggunakan budi bicaranya untuk memerintahkan Prestij untuk membayar kos kepada peguam bela Pradhan atas dasar ganti rugi menurut A 28 k 3B(1)(h) dan (4) dibaca bersama A 59 k 16(2) dan (4); (9) sama ada kedua-dua adjudikator mempunyai bidang kuasa di bawah APAPIP untuk menjalankan tugasnya; (10) sama ada adjudikator melebihi bidang kuasa mereka di dalam peruntukan s 15(d) yang dibaca dengan s 27(1) APAPIP; (11) sama ada adjudikator telah melanggar prinsip kedua keadilan semula jadi seperti yang difahami di dalam ss 15(b) dan 24(c) APAPIP; (12) sama ada mahkamah perlu menggunakan kuasa budi bicaranya di bawah ss 50 dan 51(2) ASR untuk membenarkan permohonan injunksi Prestij; dan (13) sama ada mahkamah perlu memberikan kebenaran di bawah s 28(2) APAPIP bagi kedua-dua keputusan adjudikasi yang akan dilaksanakan terhadap Prestij.

Diputuskan, membenarkan permohonan pentadbir harta Pradhan dengan kos dibayar oleh Prestij atas dasar ganti rugi kepada pentadbir harta Pradhan;

menolak SP Prestij dengan kos; membenarkan perlaksanaan SP dengan kos:

(1) Mahkamah Tinggi tidak mempunyai 'bidang kuasa' di bawah perkara 121(1) PP untuk melaksanakan dan/atau menguatkuasakan HCA 2013 kerana: (a) tiada 'undang-undang persekutuan' (seperti yang diperuntukkan di dalam perkara 160(2) PP) yang memberikan 'bidang kuasa' di mahkamah untuk melaksanakan dan/atau menguatkuasakan HCA 2013; (b) kuasa untuk melaksanakan dan menguatkuasakan apa-apa perjanjian terletak pada kerajaan bukan kerajaan negeri) dan Parlimen (badan perundangan negeri); dan (c) kes-kes terdahulu jelas memutuskan bahawa mahkamah tidak mempunyai kuasa untuk menguatkuasakan apa-apa perkara mengenai negara-negara berdaulat. Oleh itu, mahkamah ini tidak dapat menguatkuasakan HCA 2013 dalam apa jua cara sekalipun (lihat perenggan 18–19).

(2) Adalah menjadi undang-undang mantap bahawa mana-mana perjanjian yang ditandatangani atau diratifikasi oleh kerajaan hanya boleh dikuatkuasakan di Malaysia sekiranya Parlimen meluluskan Akta Parlimen ('AP') yang melaksanakan perjanjian itu. Oleh kerana Parlimen tidak meluluskan sebarang AP yang melaksanakan HCA 2013, HCA 2013 tidak boleh dilaksanakan di mahkamah di negara ini sebagai sebahagian daripada undang-undang Malaysia. Oleh itu, tiada keperluan untuk bergantung pada HCA 2013 di dalam SP Prestij (lihat perenggan 20–21).

(3) Seksyen 114(e) Akta Keterangan ('AK') memberikan anggapan yang bahawa Pradhan telah bertindak 'betul' apabila beliau melantik kedua-dua adjudikator tersebut. Sehubungan dengan itu, Pradhan mempunyai onus dibawah ss 4(e) dan 114(e) AK untuk membuktikan bahawa Pradhan tidak bertindak 'betul' atau tidak bertindak dengan suci hati dalam pelantikan kedua-dua adjudikator tersebut. Pentadbir harta Pradhan boleh bergantung kepada s 34(1) APAPIP untuk imuniti kerana: (a) pelantikan kedua-dua seorang adjudikator tersebut telah dilakukan di bawah fungsinya sebagai pengarah di bawah ss 21(b) dan 23(1) APAPIP; dan (b) tiada bukti yang dikemukakan oleh Prestij melebihi imbangan kebarangkalian bahawa Pradhan telah bertindak tidak jujur apabila beliau melantik kedua-dua adjudikator tersebut. Selain itu, Pradhan juga tidak melepaskan beban pembuktian untuk melebihi imbangan kebarangkalian bahawa Pradhan telah bertindak tidak jujur atau tidak bertindak dengan niat baik apabila melantik kedua-dua orang adjudikator tersebut. Tidak dipertikaikan bahawa Pradhan bertindak sebagai 'pegawai atasan' AIAC seperti yang diperuntukkan di dalam perkara 1A KLRCASR apabila beliau melantik kedua-dua adjudikator tersebut. Berkenaan dengan pelantikan kedua-dua djudicator, pentadbir harta Pradhan berhak untuk bergantung kepada imuniti yang diberikan kepada Pradhan menurut

perkara 3A(2) KLRCAR yang dibacakan bersama s 3(1) DPA dan s 31.1 Jadual DPA (lihat perenggan 28–29 & 34–35).

(4) Menurut s 4(1) AK, Prestij mempunyai beban pembuktian untuk membuktian anggapan yang boleh dikakas melebihi imbangan kebarangkalian. Pradhan tidak 'secara betul' dilantik oleh kerajaan sebagai seorang pemangku pengarah dan pengarah. Juga tidak ada bukti untuk menunjukkan bahawa Pradhan tidak 'secara betul' melantik kedua-dua adjudikator tersebut. Pihaknya tidak menolak kemungkinan terdapat unsur-unsur boleh dipercayai. Walaupun diandaikan bahawa terdapat kesalahan dalam perlantikan Pradhan, s 41(a) IA, memperuntukkan kesalahan tersebut tidak dapat membatalkan pelantikan adjudikator tersebut oleh Pradhan (lihat perenggan 37–38 & 40).

(5) Mengenai perlantikan Pradhan sebagai pemangku pengarah dan pengarah, Prestij sepatutnya telah memfailkan semakan kehakiman. Adalah jelas bahawa Prestij 'terjejas teruk' oleh perlantikan Pradhan menurut A 53 k 2(4) KKM 2021. Oleh yang demikian, Prestij mempunyai locus standi untuk memfailkan semakan kehakiman perintah certiorari perintah terhadap perlantikan Pradhan. Daripada memfailkan semakan kehakiman, Prestige' telah memfailkan SP ini yang melanggar keperluan mandatori untuk semakan kehakiman adalah: (a) Prestij tidak mengikuti A 53 k 3(1) KKM 2021 yang memperuntukkan Prestij untuk mendapatkan kebenaran mahkamah sebelum Prestij boleh memfailkan semakan kehakiman; dan (b) Prestij sepatutnya memohon ke mahkamah di bawah A 53 k 3(7) KKM 2012 untuk lanjutan masa untuk memfailkan semakan kehakiman application. Hal ini bagaimanapun tidak dilakukan oleh Prestij. Memandangkan keperluan mandatori bagi sesuatu semakan kehakiman tidak diikuti, SP Prestige merupakan penyalahgunaan proses mahkamah (lihat perenggan 42–45).

(6) Oleh kerana mahkamah ini tidak mempunyai bidang kuasa ke atas Pradhan berkenaan dengan isu yang dipohon di dalam SP Prestige, mahkamah ini membenarkan permohonan Pradhan berkenaan A 28 k 3B(1)(g) KKM 2012. SP Prestige terhadap pentadbir harta remeh, menyusahkan dan/atau merupakan penyalahgunaan proses mahkamah dan dibatalkan dibawah: (a) A 18 k 19(1)(d) dibaca dengan (3) KKM 2012 dan/atau (c) bidang kuasa inherens mahkamah (lihat perenggan 50–51).

(7) Menurut A 59 k 6(1)(c) KKM 2012, mahkamah ini mempunyai budi bicara untuk memerintahkan peguam bela mana-mana pihak membayar kos kepada pihak lawan. Walau bagaimanapun, mahkamah tidak menggunakan budi bicara di bawah A 59 k 6(1)(c) KKM 2012 untuk memerintahkan peguam bela Prestij untuk menanggung rugi kos

pentadbir harta Pradhan kerana: (a) kos ini tidak ditanggung dengan salah atau tanpa sebab yang munasabah oleh peguamcara Prestij; (b) kos SP Prestij tidak dibazirkan oleh kelewatan yang tidak wajar yang disebabkan oleh peguamcara Prestij; dan (c) peguamcara Prestij tidak melakukan apa-apa salah laku atau kemungkiran yang telah menyebabkan kos kes ini. Kes ini adalah luar biasa bagi mahkamah untuk menggunakan budi bicara untuk memerintahkan Prestij membayar kos kepada pentadbir harta Pradhan atas dasar ganti rugi atas sebab-sebab bahawa: (i) sejak pengurusan kes pertama SP, peguamcara Pradhan telah memberitahu mahkamah dan peguam Prestij bahawa Pradhan akan mematuhi apa-apa keputusan yang akan dibuat. Tiada keperluan untuk SP Prestij diteruskan terhadap Pradhan. Walau bagaimanapun, SP Prestij terhadap Pradhan tidak ditarikbalik; dan (ii) apabila Pradhan meninggal dunia, peguam Pradhan sekali lagi meminta Prestij untuk mempertimbangkan semula perkara ini. Jika Prestij telah menerima cadangan Pradhan, pentadbir harta Pradhan tidak perlu diperintahkan oleh mahkamah untuk menjadi pengganti Pradhan dalam SP Prestij (lihat perenggan 54–55 & 59).

(8) Adjudikator mempunyai bidang kuasa untuk mempengerusikan prosiding adjudikasi kerana: (a) semua keperluan yang ditetapkan dalam s 2 APAPIP telah dipenuhi; (b) keadaan-keadaan yang dinyatakan dalam s 3 APAPIP tidak terpakai bagi prosiding adjudikasi; dan (c) Prestij, Quzen, PME dan kedua-dua subkontrak tidak dikecualikan daripada permohonan APAPIP di bawah s 40 oleh menteri kerja raya. Prestij tidak boleh bergantung kepada kedua-dua kesalahan untuk bidang kuasa mereka untuk mencabar dua AC kerana: (i) kandungan kedua-dua PC mempunyai butiran yang mencukupi untuk mendedahkan sebab-sebab sah tindakan yang Quzen dan PME had terhadap Prestij; (ii) kedua-dua subkontrak disediakan bagi permohonan PAM contract. Kedua-dua kesalahan tersebut hanya berkenaan dengan peruntukan yang salah dalam Kontrak PAM yang terpakai di dalam dua PC; dan (iii) Prestij tidak diprejudiskan oleh kedua-dua kesalahan tersebut (lihat perenggan 63 & 65).

(9) Menurut s 27(1) APAPIP, bidang kuasa seorang adjudikator untuk menilai prosiding adjudikasi adalah terhad kepada perkara-perkara yang dibangkitkan dalam: (a) dua PC; dan (b) kedua-dua balasan bayaran. Di dalam kes ini, adjudikator tersebut tidak melebihi bidang kuasa mereka kerana mereka tidak membuat keputusan mengenai apa-apa perkara di luar kedua-dua tuntutan pembayaran atau dua balasan bayaran. Oleh itu, tiada asas untuk mahkamah ini mengenepikan kedua-dua keputusan adjudikasi di bawah s 15(d) yang dibaca bersama s 27(1) APAPIP (lihat perenggan 66–67).

(10) Setelah meneliti kedua-dua balaan bayaran dan kedua AR dan

berdasarkan kedua keputusan adjudikasi, adjudikator telah meneliti pembelaan Prestij. Sebelum penyampaian keputusan adjudikasi, adjudikator tersebut tidak menafikan hak Prestij untuk memberi keterangan di dalam adjudikasi. Adjudikator tersebut tidak melanggar peraturan kedua di dalam ss 15(b) dan 24(c) APAPIP. Mahkamah ini akan tidak mengenepikan keputusan adjudikasi tersebut menurut s 15(b) APAPIP, dan dengan itu membenarkan perlaksanaan SP tersebut (lihat perenggan 70–72 & 83).

(11) Mahkamah ini mempunyai budibicara di bawa ss 50 dan 51(2) ASR untuk membenarkan injunksi fortuna. Mahkamah ini tidak dapat membenarkan permohonan injunksi fortuna Prestij kerana: (a) Quzen adalah 'pemiutang' Prestij menurut s 464(1)(b) Akta Syarikat 2016 dan berhak memfailkan petisyen penggulungan terhadap Prestij menurut s 465(1)(e) Akta Syarikat 2016; dan (b) pelaksanaan hak statutori Quzen diperuntukkan di bawah ss 464(1)(b) dan 465(1)(e) Akta Syarikat 2016 bukanlah tergolong dalam salah guna proses mahkamah (lihat perenggan 78–79).]

Cases referred to

ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal [2016] MLJU 1776, CA (refd)

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)

All Malayan Estates Staff Union v Rajasegaran & Ors [2006] 6 MLJ 97; [2006] 5 AMR 585, FC (folld)

Cook and another v Sir James Gordon Sprigg [1899] AC 572, PC (refd)

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)

Guangxi Dev & Cap Sdn Bhd v Sycal Bhd [2018] MLJU 1542; [2019] 1 CLJ 592, CA (refd)

Ideal City Development Sdn Bhd v PWC Bina Sdn Bhd and other appeals [2018] MLJU 1711; [2019] 2 CLJ 615, CA (distd)

Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd [2019] 2 MLJ 362; [2019] 2 CLJ 229, CA (refd)

Kraft Foods Schweiz Holding GmbH v Pendaftar Cap Dagangan [2016] 11 MLJ 702, HC (refd)

Kurniaan Maju Sdn Bhd v HSA Setiamurni Sdn Bhd [2020] 9 MLJ 103, HC (refd)

Lee Lee Cheng (F) v Seow Peng Kwang [1960] 1 MLJ 1, CA (refd)

Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd [2019] 3 MLJ 244, CA (refd)

Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd [2019] 4 MLJ 141, FC (refd)

Maclaine Watson & Co Ltd v Department of Trade and Industry (and related appeals) [1990] LRC (Const) 193, HL (refd)

Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi &

Anor [2014] 3 MLJ 145, FC (refd)
Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750, FC (refd)
Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2020] 6 MLJ 224; [2019] 5 AMR 516, FC (refd)
Mega Sasa Sdn Bhd v Kinta Bakti Sdn Bhd & Ors [2020] 10 MLJ 409, HC (folld)
Naza Engineering & Construction Sdn Bhd v SSL Dev Sdn Bhd [2020] 9 MLJ 499, HC (refd)
Otis Elevator Company (M) Sdn Bhd v Castmet Sdn Bhd and another case [2020] MLJU 2306; [2020] AMEJ 1769, HC (refd)
Pacific Bunkers Pte Ltd v Owners of The Ships or Vessels 'Geniki Sarawak' and 'Geniki Johor' (No 2) and another case [2015] 11 MLJ 145, HC (refd)
Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals [2015] MLJU 1873; [2015] 1 LNS 1435, HC (refd)
Secretary of State in Council of India v Kamachee Boye Sahaba (1859) 7 Moo Ind App 476, PC (refd)
Uzma Engineering Sdn Bhd v Khan Co Ltd and another summons [2020] MLJU 1272, HC (refd)
View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22; [2019] 5 CLJ 479, FC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 2, 3, 4, 5, 5(1), (2)(a), (2)(b), (2)(c), (2)(d), 6(2), 10(1), 12(2)(a), (2)(b), (2)(c), 13(c), 15(a), (b), (c), (d), 21(b), 23(1), 24(c), 26, 26(1), 27(1), 28, 28(1), (2), 34(1), 40
Diplomatic Privileges (Vienna Convention) Act 1966 s 3(1), Schedule, art 31.1
Evidence Act 1950 ss 4(1), 114(e)
Federal Constitution arts 39, 40(1), 74(1), 121(1), 160(2), Ninth Schedule, List I, Items 1(a), (b)
International Organizations (Privileges and Immunities) Act 1992 ss 3(1), 4(1), (1)(b)(i), (1)(b)(ii), Second Schedule, Parts I, II
Interpretation Acts 1948 and 1967 ss 2(1)(a), 7, 41(a), Part I
Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 regs 1A, 3A(2)
National Land Code s 340(3)
Rules of Court 2012 O 18 r 19(1)(b), (3), O 28 r 3B(1)(g), (1)(h), (4), O 53 rr 2(4), 3(1), (6), (7), O 59 r 3(2), 6(1), (1)(c), 16(2), (4), O 92 r 4
Specific Relief Act 1950 ss 41, 50, 51(2)

Lee Tze Jiet (Cheok Ng Lee Law Chambers) for Prestij.
Foo Joon Liang (Kang Mei Yee and Carissa How Chen Huey with him) (Gan Partnership) for Mr Pradhan.
Aida Mastura bt Mohamed Aman (Senior Federal Counsel, Attorney General's

Chambers) for Malaysian Government.
Liow Si Koon (Jennifer Lai Sui Ting and Sia Chee Shen with him) (Liow & Co) for Quzen.
Wong Kah Hung (KH Wong & Assoc) for PME Power Engineering Sdn Bhd.

Wong Kian Kheong J:

A. BACKGROUND

[1] In 1978, the Malaysian Government ('government') entered into a 'Host Country Agreement' ('the HCA (1978)') with the Asian-African Legal Consultative Committee ('AALCC'). AALCC is an international governmental organisation and has changed its name in 2001 to Asian-African Legal Consultative Organization ('AALCO').

[2] The HCA (1978) established the Kuala Lumpur Regional Centre for Arbitration ('KLRCA').

[3] The HCA (1978) was renewed by the government and AALCO on 26 March 2013 ('the HCA (2013)'). On 7 February 2018, a supplementary agreement to the HCA (2013) has been concluded by the government and AALCO.

[4] KLRCA is subsequently named as Asian International Arbitration Centre ('AIAC').

[5] On 21 November 2018, the late Mr Vinayak Prabhakar Pradhan ('Mr Pradhan') was appointed by the government as AIAC's acting Director ('acting director'). The government subsequently confirmed Mr Pradhan's appointment as AIAC's Director ('director') on 8 May 2019.

[6] Pursuant to ss 21(b) and 23(1) of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'), Mr Pradhan had appointed the following two adjudicators ('two adjudicators') in two adjudication proceedings ('two adjudication proceedings') commenced against Prestij Mega Construction Sdn Bhd ('Prestij'):

(a) by way of AIAC's letter dated 5 August 2019, Mr Loh Charn Yung ('Mr Loh') had been appointed to adjudicate an 'adjudication claim' (AC) by Quzen Sdn Bhd ('Quzen') against Prestij; and

(b) with regard to an AC by PME Power Engineering Sdn Bhd ('PME') against Prestij, Dr Wendy Ooi Su Ghee ('Dr Ooi') had been appointed in AIAC's letter dated 8 October 2019 to be an adjudicator for PME's AC against Prestij.

[7] The two adjudicators has delivered the following two adjudication decisions ('two AD's'):

(a) Mr Loh has adjudicated that Prestij shall pay to Quzen, among others, an adjudicated amount of RM255,261.85 with interest, costs of adjudication, adjudicator's fees and AIAC's fees ('Mr Loh's AD'); and

(b) a sum of RM214,829.61 together with interest, costs of adjudication, adjudicator's fees and AIAC's fees has been adjudicated by Dr Ooi to be paid by Prestij to PME ('Dr Ooi's AD').

[8] By way of a letter dated 20 November 2019 from AALCO, Mr Pradhan's appointment as acting director was terminated with effect from 8 May 2019.

B. PROCEEDINGS

[9] The following four originating summonses ('OS') have been filed in this court:

(a) Prestij has initially filed OS No BA-24C-13–02 of 2020 against Mr Pradhan and Quzen ('Prestij's OS (Quzen)');

(b) OS No BA-24C-25–03 of 2020 has been instituted by Prestij against Mr Pradhan and PME ('Prestij's OS (PME)');

(c) Quzen has filed OS No BA-24C-54–06 of 2020 for leave of court under s 28 of the CIPAA to enforce Mr Loh's AD against Prestij ('Quzen's OS'); and

(d) in OS No BA-24C-15–02 of 2020, PME has applied for leave of court to enforce Dr Ooi's AD against Prestij ('PME's OS').

[10] On 8 March 2020, Mr Pradhan passed on. Hence, the personal representative of Mr Pradhan's estate ('Mr Pradhan's representative') was ordered by the court to be a substitute for Mr Pradhan in Prestij's OS (Quzen) and Prestij's OS (PME). I will refer in this judgment to Prestij's OS (Quzen) and Prestij's OS (PME) as 'Prestij's two OS'.

[11] Prestij has obtained leave of court to join government as third defendant in Prestij's two OS.

[12] In Prestij's two OS, Prestij has prayed for among others, the following orders:

(a) a declaration that Mr Pradhan's appointment as acting director has been terminated by AALCO 'immediately' on 8 May 2019;

(b) a declaration that Mr Pradhan was not the acting director after 8 May 2019;

(c) the two AD's shall be set aside; and

(d) a 'Fortuna injunction' should be granted to restrain Quzen from filing and serving a winding up petition against Prestij based on Mr Loh's AD ('Prestij's Fortuna injunction application (Quzen)').

[13] Mr Pradhan's representative has applied in Prestij's two OS for the following orders ('two applications (Mr Pradhan's representative)'):

(a) a declaration that the court has no jurisdiction over Mr Pradhan with regard to the claims and/or relief applied for in Prestij's two OS;

(b) the court shall strike out Prestij's two OS; and

(c) costs for the two applications (Mr Pradhan's representative) shall be paid by Prestij's solicitors to Mr Pradhan's representative on an indemnity basis.

C. ISSUES

[14] The following questions arise in the two applications (Mr Pradhan's representative) and four OS:

(a) does the court have 'jurisdiction' and/or 'power' within the meaning of art 121(1) of the Federal Constitution ('the FC') to implement and/or enforce HCA (2013)?

(b) can HCA (2013) be enforced by court when HCA (2013) has not been enacted by our Legislature as an Act of Parliament ('AP')?

(c) whether Mr Pradhan had immunity against Prestij's two OS under:

(i) s 34(1) of the CIPAA; and/or

(ii) reg 3A(2) of the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 ('the KLRCAR') read with s 3(1) of the Diplomatic Privileges (Vienna Convention) Act 1966 ('the DPA') and article 31.1 of the Schedule to DPA ('article 31.1');

(d) whether Prestij has adduced any evidence to rebut four rebuttable presumptions under s 114(e) of the Evidence Act 1950 ('the EA') that:

(i) the government had 'regularly' appointed Mr Pradhan, first as acting director and subsequently as director ('Mr Pradhan's two appointments'); and

(ii) Mr Pradhan had 'regularly' appointed the two adjudicators;

(e) even if there were defects in Mr Pradhan's two appointments, would such defects invalidate Mr Pradhan's appointment of the two adjudicators according to s 41(a) of the Interpretation Acts 1948 and 1967 ('the IA')?

(f) if the court has jurisdiction and power to decide on the validity of Mr Pradhan's two appointments, whether Prestij's two OS can circumvent:

(i) the mandatory requirement for leave of court to file a judicial review application ('JR application') as stipulated in O 53 r 3(1) of the Rules of Court 2012 (the RC'); and

(ii) the mandatory three-month time period to file a JR application as provided in O 53 r 3(6) of the RC ('three month limitation period') and the need to obtain court's leave under O 53 r 3(7) of the RC if the three month limitation period has been exceeded;

(g) can the court grant the declarations applied for in Prestij's two OS under s 41 of the Specific Relief Act 1950 ('the SRA')?

(h) if the court strikes out Prestij's two OS, whether the court should exercise its discretion to order Prestij or Prestij's solicitors to pay costs to Mr Pradhan's representative on an indemnity basis pursuant to O 28 r 3B(1)(h) and (4) read with O 59 r 16(2) and (4) of the RC;

(i) did the two adjudicators have jurisdiction under CIPAA to adjudicate the two adjudication proceedings? In this regard:

(i) did the 'payment claims' by Quzen and PME against Prestij ('two PC's') breach s 5(2)(b) of the CIPAA? and

(ii) if the two PC's have breached s 5(2)(b) of the CIPAA, in view of s 26(1) of the CIPAA, whether such breaches would invalidate the two adjudication proceedings and two AD's;

(j) if the two adjudicators had jurisdiction to adjudicate the two adjudication proceedings, did the two adjudicators exceed their jurisdiction within the meaning of s 15(d) read with s 27(1) of the CIPAA?

(k) whether the two adjudicators had breached the second rule of natural justice ('second rule') as understood in ss 15(b) and 24(c) of the CIPAA. This issue discusses whether the second rule requires the two adjudicators to consider all contentions advanced by Prestij in the two adjudication proceedings;

(l) should the court exercise its discretionary power under ss 50 and 51(2) of the SRA to grant Prestij's Fortuna injunction application (Quzen)? and

(m) whether the court should grant leave under s 28(2) of the CIPAA for the two AD's to be enforced against Prestij.

D. DOES THE COURT HAVE 'JURISDICTION' AND 'POWER' REGARDING HCA (2013)?

[15] Article 121(1) of the FC provides as follows:

> 121 *Judicial power of the Federation*
>
> (1) *There shall be two High Courts of co-ordinate jurisdiction and status*, namely —
>
> (a) *one in the States of Malaya, which shall be known as the High Court in Malaya* and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and
>
> (b) *one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak* and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
>
> and such inferior courts as may be provided by federal law; and *the High Courts* and inferior courts *shall have such jurisdiction and powers as may be conferred by or under federal law*. (Emphasis added.)

[16] In *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750 (FC) at [458]–[460], [469]–[470], Abdul Rahman Sebli FCJ has delivered a 4–3 majority decision of the Federal Court which affirms the constitutionality of art 121(1) of the FC (introduced by Constitution (Amendment) Act 1988 (Act A704)).

[17] The terms 'jurisdiction' and 'power' of the court have been explained in *Lee Lee Cheng (F) v Seow Peng Kwang* [1960] 1 MLJ 1 at p 3, by Thomson CJ (as he then was) in the Federation of Malaya's Court of Appeal as follows:

> *It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly. This leads to the view that in the [Courts Ordinance 1948] there is a distinction between the jurisdiction of a Court and its powers, and this suggests that the word 'jurisdiction' is used to denote the types of subject matter which the Court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by reason of their nature or by reason of extra-territoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers*. (Emphasis added.)

[18] I am of the view that the High Court has neither 'jurisdiction' nor 'power' under art 121(1) of the FC to implement and/or enforce HCA (2013). This decision is premised on the following reasons:

(a) there is no 'federal law' (as defined in art 160(2) of the FC) which has

A conferred 'jurisdiction' and 'power' on the court to execute and/or enforce HCA (2013). I am not aware of any AP which has conferred 'jurisdiction' on the court to deal with HCA (2013) as explained in *Lee Lee Cheng*. Nor do I know of any AP which has provided the court with a 'power' to exercise regarding HCA (2013) within the meaning of *Lee Lee Cheng*;

B (b) the power to implement and enforce any treaty is vested in the government (not state government) and Parliament (not the State Legislative Assembly).

The government has a discretion to sign, accede to, ratify, execute and enforce any treaty pursuant to arts 39 and 40(1) of the FC. Articles 39 and 40(1) of the C FC provide as follows:

39 *Executive authority of Federation*

The executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second D *Schedule, by him or by the Cabinet or any Minister authorized by the Cabinet, but Parliament may by law confer executive functions on other persons*.

40 *Yang di-Pertuan Agong to act on advice*

(1) *In the exercise of his functions under this Constitution or federal law the Yang* E *di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet*, except as otherwise provided by this Constitution; but shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet. (Emphasis added.)

F Parliament has the legislative power pursuant to art 74(1) read with Items 1(a) and (b) in the 'Federal List' of the Ninth Schedule to FC ('Items 1(a)' and '(b)') to pass any AP regarding any treaty. I reproduce below art 74(1) of the FC, Items 1(a) and (b):

G 74 *Subject matter of federal* and State *laws*

(1) *Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).*

H *Ninth Schedule*

[Articles 74, 77]

Legislative Lists

List I — Federal List

I *1. External affairs, including —*

(a) *treaties, agreements and conventions with other countries and all matters which bring the Federation into relations with any other country*;

(b) *implementation of treaties, agreements and conventions with other countries*; ... (Emphasis added.)

(c) the following cases have clearly decided that the court does not have any power to enforce any matter regarding sovereign states:

(i) in an appeal from India to the Privy Council, *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 7 Moo Ind App 476 at p 529 (*Kamachee*'s case), Lord Kingsdown has decided as follows:

> *The general principle of law was not, as indeed it could not, with any colour of reason be disputed. The transactions of independent States between each other are governed by other laws than those which Municipal Courts administer: such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make*. (Emphasis added.)

(ii) in *Cook and another v Sir James Gordon Sprigg* [1899] AC 572 at p 578, Lord Halsbury LC has delivered the following judgment of the Privy Council in an appeal from South Africa:

> *It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer*. (Emphasis added.)

(iii) in *Maclaine Watson & Co Ltd v Department of Trade and Industry (and related appeals)* [1990] LRC (Const) 193 (*Maclaine Watson*'s case), the following judgments have been given in the House of Lords:

(A) Lord Templeman has decided as follows, at pp 197, 200 and 201:

> *My Lords, these appeals raise a short question of construction of the plain words of a statutory instrument. The trial judges (Staughton)* ([1987] BCLC 667) and Millett J ([1987] BCLC 707; [1987] 1 All ER 890; [1987] 3 All ER 787, 886) *and the Court of Appeal (Kerr, Nourse and Ralph Gibson LJJ* ([1988] 3 All ER 257; [1989] Ch 72) *rightly decided this question in favour of the respondents. Losing the construction argument, the appellants put forward alternative submission which are unsustainable. Those submissions, if accepted, would involve a breach of the British constitution and an invasion by the judiciary of the functions of the government and of Parliament. The government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty*.
>
> ...
>
> *... Treaty rights and obligations conferred or imposed by agreement or by international law cannot be enforced by the courts of the United Kingdom*.
>
> ...
>
> *The courts of the United Kingdom have no power to enforce at the behest of any sovereign state or at the behest of any individual citizen of any sovereign state rights granted by treaty or obligations imposed in respect of a treaty by international law*. (Emphasis added.)

(B) Lord Oliver has followed *Kamachee*'s case and *Cook*. According to Lord Oliver at p 219:

> *It is axiomatic that municipal courts have not and cannot have the competence to adjudicate on or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law*. (Emphasis added.)

(d) in *Mega Sasa Sdn Bhd v Kinta Bakti Sdn Bhd & Ors* [2020] 10 MLJ 409 at [73], Lim Chong Fong J has applied *Maclaine Watson*'s case.

[19] Premised on the reasons and cases which have been explained in the above para 18, this court cannot enforce HCA (2013) in any manner. If otherwise, as explained by Lord Templeman in *Maclaine Watson*'s case, there will be 'an invasion by the judiciary of the functions of the government and of Parliament' with respect to HCA (2013) which is tantamount to a 'judicial overreach'.

E. HAS HCA (2013) BEEN ENACTED BY PARLIAMENT BY WAY OF AN AP?

[20] It is trite law that any treaty signed, acceded to or ratified by the government can only be enforced in Malaysia if Parliament has passed an AP which implements that treaty. It is decided in *Kraft Foods Schweiz Holding GmbH v Pendaftar Cap Dagangan* [2016] 11 MLJ 702 at [23] ('Kraft Foods'), as follows:

> [23] *Malaysia is a signatory to the TRIPS Agreement on 1 January 1995. The following cases have decided that even if Malaysia is bound by a treaty in public international law, such a treaty is only enforceable in Malaysian municipal law if our Parliament has passed legislation to give effect to such a treaty*:
>
> (1) in the Federal Court case of *Bato Bagi & Ors v Kerajaan Negeri Sarawak & another appeal* [2011] 6 MLJ 297, at para 180, Raus Sharif FCJ (as he then was), decided as follows:
>
> [180] *On the issue whether this court should use 'international norms' embodied in the UNDRIP to interpret arts 5 and 13 of the Federal Constitution I have only this to say. International treaties do not form part of our law, unless those provisions have been incorporated into our law*. (Emphasis added.)
>
> (2) in *Air Asia Bhd v Rafizah Shima bt Mohamed Aris* [2014] 5 MLJ 318 at paras 30, 35 and 37–41, *Zawawi Salleh JCA held in the Court of Appeal as follows* —
>
> [30] Before proceeding to discuss the issue, we would like to advert to some general discussions about CEDAW. *CEDAW was adopted by the General Assembly of the United Nations in 1979 and came into force in 1981. It is a landmark international agreement that affirms principles of human rights and equality for*

women around the world. As of April 2014, 188 states have ratified or acceded to treaty …

[35] *Malaysia is a signatory to CEDAW and ratified it in 1995. …*

[37] *In our considered opinion, CEDAW does not have the force of law in Malaysia because the same is not enacted into any local legislation*.

[38] *In theoretical terms, the application of international legal systems is often explained in terms of the doctrines of incorporation (or monism) and transformation (or dualism)*.

[39] According to the doctrine of incorporation, international law is simply two components of single body of knowledge called law. Law is seen as a single entity of which international and municipal versions are merely particular manifestation. A judge can declare a municipal law invalid if it contradicts an international law because, in some states, the latter is said to prevail.

[40] *The doctrine of transformation, on the other hand, holds that the two systems of law, international law and municipal law, are completely separate. A rule of international law can only become part of municipal law if and when it is transformed into municipal law by the passing of local legislation* (see Dinah Shelton (Ed), International Law in Domestic Legal System: Incorporation, Transformation and Persuasion (Oxford University Press, 2011); Brownlie, I, Principles of International Law, 3rd Ed, London, 1996, Chap 4).

[41] *The practice in Malaysia with regard to the application of international law is generally the same as that in Britain, namely, the executive possesses the treaty-making capacity while the power to give effect domestically rests with parliament. For a treaty to be operative in Malaysia, therefore, it requires legislation by parliament*. (Emphasis added.)

(3) the judgment of Shankar J (as he then was) in the High Court case of *Public Prosecutor v Narongne Sookpavit & Ors* [1987] 2 MLJ 100 at p 105:

As to this, Article 76(1) of the Malaysian Constitution provides the Federal Parliament with the competence to enact legislation for the purpose of implementing treaties, agreements or conventions between the Federation and any other country or any decision of any international organisation of which the Federation is a member. So before a Convention can come into force in Malaysia, Parliament must enact a law to that effect. The Carriage by Air Act is one such example and the importation of the Geneva Convention on the Territorial Sea and the Contiguous Zone (1958) by the Emergency (Essential Powers) Ordinance No 7 of 1969 is another. *No Malaysian statute has been cited to me to show that art 14 had become part of Malaysian Law. In fact the Ordinance just cited stops at art 13 and the irresistible inference must be that art 14 was not intended to be imported into this country*. (Emphasis added.)

There is no appeal to the Court of Appeal against the above decision in *Kraft Foods*.

[21] As Parliament has not passed any AP which implements HCA (2013), HCA (2013) cannot therefore be enforced by our courts as part of our Malaysian law. Hence, no reliance can be placed on HCA (2013) in Prestij's two OS.

F. WHETHER MR PRADHAN HAD IMMUNITY AGAINST PRESTIJ'S TWO OS

F(1). Could Mr Pradhan's representative rely on s 34(1) of the CIPAA?

[22] Section 34(1) of the CIPAA provides as follows:

> 34 *Immunity of adjudicator and KLRCA*
>
> (1) *No action or suit shall be instituted or maintained in any court against* an adjudicator or *the KLRCA or its officers for any act or omission done in good faith in the performance of his or its functions under this Act*. (Emphasis added.)

[23] According to s 2(1)(a) of the IA, Part I of the IA applies to CIPAA because CIPAA is enacted after 18 May 1967. Section 7 of the IA (in Part I of the IA) states as follows:

> 7 *Reference to office-holder includes acting* holding, etc
>
> *A reference to the holder of* any public or *other office* (including a reference in an appointment made pursuant to section 50) *is a reference to the person for the time being lawfully* holding, *acting in* or exercising the functions of *that office*. (Emphasis added.)

By reason of s 7 of the IA, Mr Pradhan was an 'officer' of AIAC as understood in s 34(1) of the CIPAA even though he was its acting director. This is also the decision of Lim Chong Fong J in *Mega Sasa* at [77] to [79]. In any event, when Mr Pradhan appointed the two adjudicators, he was already confirmed as the director.

[24] The first question regarding the application of s 34(1) of the CIPAA concerns the meaning of the phrase 'good faith'. Section 4 of the CIPAA does not provide for a definition of 'good faith'. Nor am I able to find any previous case which has construed the phrase 'good faith' in s 34(1) of the CIPAA.

[25] The Federal Court case of *Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2019] 4 MLJ 141 concerns, among others, the meaning of 'good faith' in proviso to s 340(3) of the National Land Code (regarding purchasers of land or interest in land in good faith and for valuable consideration). Hasan Lah FCJ has decided in *Liputan Simfoni* at [72], as

follows:

> [72] *In Stroud's Judicial Dictionary of Words and Phrases (9th Ed) it states that the words 'in good faith' have a core meaning of honesty*. It further states that the term is to be found in many statutory and common law contexts, and because they are necessarily conditioned by their context, it is dangerous to apply judicial attempts at definition in one context to that of another. (Emphasis added.)

[26] I am of the view that the meaning of 'good faith' as provided in *Stroud's Judicial Dictionary of Words and Phrases* (9th Ed) (which has been applied by the Federal Court in *Liputan Simfoni*) may be used to interpret the expression of 'good faith' in s 34(1) of the CIPAA. Hence, if there is a dishonest act or omission by an adjudicator, AIAC or AIAC's officer in the performance of his or its functions under CIPAA, the adjudicator, AIAC or AIAC's officer cannot claim immunity under s 34(1) of the CIPAA because the adjudicator, AIAC or AIAC's officer has not acted in good faith with regard to the act or omission in question.

[27] The next question that arises is who has the burden of proof regarding the existence of 'good faith' or otherwise in s 34(1) of the CIPAA — whether Prestij has the onus to prove a lack of good faith on Mr Pradhan's part in the appointment of the two adjudicators or whether Mr Pradhan's representative has the burden to prove Mr Pradhan had acted in good faith when he appointed the two adjudicators.

[28] Section 114(e) of the EA provides a rebuttable presumption that Mr Pradhan had acted 'regularly' when he appointed the two adjudicators. According to s 114(e) of the EA:

> 114 *Court may presume existence of certain fact*
>
> *The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public* and private *business, in their relation to the facts of the particular case*.
>
> *ILLUSTRATIONS*
>
> ...
>
> (e) that judicial and *official acts have been regularly performed*; (Emphasis added.)

Section 4(1) of the EA provides as follows:

> 4 *Presumption*
>
> (1) *Whenever it is provided by this Act that the court may presume a fact, it may either regard the fact as proved unless and until it is disproved*, or may call for proof of it. (Emphasis added.)

According to s 4(1) of the EA, when the EA provides that the court may presume a fact (such as by way of an application of s 114(e) of the EA), the court may 'regard the fact as proved unless and until it is disproved'. Consequently, Prestij has the onus under s 4(1) read with s 114(e) EA to prove that Mr Pradhan had not acted 'regularly' or had not acted in good faith in his appointment of the two adjudicators.

[29] I am of the view that Mr Pradhan's representative can rely on s 34(1) of the CIPAA because:

(a) Mr Pradhan's appointment of the two adjudicators was done in his performance of his functions as the director under ss 21(b) and 23(1) of the CIPAA; and

(b) no evidence has been adduced by Prestij to prove on a balance of probabilities that Mr Pradhan had acted dishonestly when he appointed the two adjudicators. In other words, there is no proof that Mr Pradhan did not act in good faith in the appointment of the two adjudicators. In any event, I am not satisfied that Prestij has discharged the burden to prove on a balance of probabilities that Mr Pradhan had acted dishonestly or had not acted in good faith when he appointed the two adjudicators.

[30] In *Mega Sasa*, at [80], [81] and [85], Lim Chong Fong J has also reached the same decision regarding the application of s 34(1) of the CIPAA to Mr Pradhan.

F(2). Whether reg 3A(2) of the KLRCAR applies in this case

[31] KLRCAR have been made by the Minister under ss 3(1) and 4(1) of the International Organizations (Privileges and Immunities) Act 1992 ('the IOA').

[32] I reproduce below the relevant parts of s 4(1)(b)(i), (ii), Parts I and II of the Second Schedule to IOA ('Second Schedule') as well as s 3(1) of the DPA and article 31.1:

> IOA
>
> Privileges and *immunities of certain international organizations and persons.*
>
> 4(1) Subject to this section, and to subsections 11(3), 11(4) and 11(5), *the Minister may by regulations either with or without restrictions or to the extent or subject to the conditions prescribed in such regulations —*
>
> ...
>
> (b) *confer —*
>
> (i) *upon a person who is, or is performing the duties of, a high officer all or any of*

the privileges and *immunities specified in Part I of the Second Schedule*; *and*

(ii) *upon a person who has ceased to be*, or perform the duties of, *a high officer the immunities specified in Part II of the Second Schedule*;

...

SECOND SCHEDULE

[Section 4]

PART I

PRIVILEGES AND *IMMUNITIES OF HIGH OFFICER OF INTERNATIONAL ORGANIZATION*

The like privileges and *immunities* (including privileges and immunities in respect of a spouse and children under the age of twenty-one years) *as are accorded to a diplomatic agent.*

PART II

IMMUNITIES OF FORMER HIGH OFFICER OF INTERNATIONAL ORGANIZATION

Immunity from suit and from other legal process in respect of acts and things done in his capacity as such an officer.

DPA

Application of Vienna Convention

3(1) *Subject to section 4, the Articles set out in the Schedule (being Articles of the Vienna Convention on Diplomatic Relations signed in 1961) shall have the force of law in Malaysia and shall for that purpose be construed in accordance with the following provisions of this section*.

...

SCHEDULE

ARTICLES OF THE VIENA CONVENTION ON DIPLOMATIC RELATIONS (1961) HAVING THE FORCE OF LAW IN MALAYSIA

...

Article 31

1. *A diplomatic agent* shall enjoy immunity from the criminal jurisdiction of the receiving State. *He shall also enjoy immunity from its civil* and administrative *jurisdiction*, except in the case of —

(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions. (Emphasis added.)

[33] Regulation 3A(2) of the KLRCAR states as follows:

3A Privileges and *immunities of High Officer.*

(1) ...

(2) *A High Officer, if he is a citizen of Malaysia, shall only be entitled to the* privileges and *immunities in respects of acts and things done in his capacity as the High Officer*. (Emphasis added.)

[34] According to reg 1A of the KLRCAR, 'High Officer' means the person for the time being holding the post of the director of KLRCA. It is not disputed that Mr Pradhan was acting as AIAC's 'High Officer' as understood in reg 1A of the KLRCAR when he appointed the two adjudicators.

[35] With regard to Mr Pradhan's appointment of the two adjudicators, I decide that Mr Pradhan's representative is entitled to rely on immunity granted to Mr Pradhan pursuant to reg 3A(2) of the KLRCAR read with s 3(1) of the DPA and article 31.1. I am comforted by the fact that Lim Chong Fong J has reached the same decision in *Mega Sasa* at [82]–[84].

G. COULD PRESTIJ REBUT FOUR REBUTTABLE PRESUMPTIONS UNDER S 114(E) OF THE EA?

[36] Premised on s 114(e) of the EA, there are four rebuttable presumptions ('four rebuttable presumptions') as follows:

(a) the government had 'regularly' appointed Mr Pradhan as the acting director;

(b) Mr Pradhan had been 'regularly' appointed by the government as the director; and

(c) Mr Pradhan had 'regularly' appointed the two adjudicators.

[37] In view of s 4(1) of the EA, Prestij bears the burden to rebut the four rebuttable presumptions on a balance of probabilities.

[38] Prestij has not adduced any evidence to show that Mr Pradhan had not been 'regularly' appointed by the government as the acting director and

director. Nor is there any evidence to show that Mr Pradhan had not 'regularly' appointed the two adjudicators. In any event, I am not satisfied that Prestij has succeeded to discharge the onus to rebut the four rebuttable presumptions on a balance of probabilities.

H. EFFECT OF S 41(A) OF THE IA

[39] Section 41(a) of the IA provides as follows:

> 41 *Powers of certain bodies not affected by* vacancy, *etc*
>
> A board, commission, committee or *similar body (whether corporate or unincorporated) established by or under a written law may act* notwithstanding any vacancy in its membership; *and its proceedings shall not be invalidated by —*
>
> (a) *any defect afterwards discovered in the appointment* or qualification *of a person purporting to be a member*; or ... (Emphasis added.)

[40] Even if it is assumed that there were defects in Mr Pradhan's two appointments, by reason of s 41(a) of the IA, such defects could not invalidate Mr Pradhan's appointment of the two adjudicators. I rely on the following decisions:

(a) the judgment of Augustine Paul FCJ in the Federal Court case of *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 at pp 116–121; [2006] 5 AMR 585 at pp 604–609; and

(b) *Mega Sasa*, at [74]–[76].

I. WHETHER PRESTIJ SHOULD HAVE FILED A JR APPLICATION

[41] I reproduce below O 53 rr 2(4), 3(1), (6) and (7) of the RC:

> *Applications*
>
> O 53 r 2(1) ...
>
> ...
>
> (4) *Any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application.*
>
> *Leave*
>
> O 53 r 3(1) *An application under this Order shall not be made unless leave therefor has been granted in accordance with this rule.*
>
> ...
>
> (6) *An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.*
>
> (7) *The Court may, upon an application, extend the time specified in rule 3(6) if it*

considers that there is a good reason for doing so. (Emphasis added.)

[42] Firstly, the government's appointments of Mr Pradhan as the acting director and director had sufficient elements of public law for which Prestij should have filed a JR application — please refer to the judgment of the Federal Court delivered by James Foong FCJ in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 at [21].

[43] It is clear that Prestij is 'adversely affected' by Mr Pradhan's two appointments within the meaning of O 53 r 2(4) of the RC — please see Hasan Lah FCJ's judgment in the Federal Court case of *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145 at [1], [44] and [57]–[59]. Hence, Prestij has the threshold locus standi to file a JR application for a certiorari order to quash Mr Pradhan's two appointments.

[44] Instead of filing a JR application to quash Mr Pradhan's two appointments, Prestij's two OS have been filed which circumvents the following two mandatory requirements for a JR application ('two mandatory requirements (JR application)'):

(a) Prestij has unlawfully bypassed O 53 r 3(1) of the RC which requires Prestij to obtain leave of court before Prestij can file a judicial review application; and

(b) the three month limitation period as stipulated in O 53 r 3(6) of the RC has long passed in respect of Mr Pradhan's appointments of the two adjudicators. Prestij should have applied to court under O 53 r 3(7) of the RC for an extension of time to file a judicial review application. This was however not done by Prestij.

[45] In view of Prestij's circumvention of the two mandatory requirements (JR application), Prestij's two OS constitute abuses of court process.

J. CAN THE COURT GRANT DECLARATIONS SOUGHT FOR IN PRESTIJ'S TWO OS?

[46] I reproduce s 41 of the SRA as follows:

s 41 SRA *Discretion of court as to declaration of status or right*

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so. (Emphasis added.)

[47] Even if it is assumed that this court has 'jurisdiction' and/or 'power' to decide the validity of Mr Pradhan's two appointments, the court is unable to grant the declarations prayed for in Prestij's two OS under s 41 of the SRA. My reasons are as follows:

(a) in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at 41, Hashim Yeop Sani SCJ (as he then was) has decided as follows in the 3–2 majority decision of the Supreme Court:

> *Section 41 does not sanction every form of declaration but only a declaration that the plaintiff is entitled to a specific legal character or to any right as to property. Therefore any person who has 'a right to any legal character' may bring an action against anyone who denies that right. The prerequisite for such a declaratory action is that the plaintiff must first establish that he qualifies as a person entitled to any legal character or to any right as to any property. The legal character or the right must exist at the time the action is instituted*. (Emphasis added.)
>
> Based on s 41 of the SRA as interpreted by our highest court in Lim Kit Siang, Prestij must first satisfy the court that Prestij is '*entitled to any legal character, or to any right as to any property*' ('legal entitlement') before the court can exercise its discretion to grant the declarations prayed for in Prestij's two OS.
>
> I fail to see how Prestij has any legal entitlement regarding Mr Pradhan's two appointments. On this ground alone, the court cannot grant under s 41 of the SRA any of the declarations prayed for in Prestij's two OS; and

(b) even if it is assumed that Prestij can satisfy the court of its legal entitlement regarding Mr Pradhan's two appointments, the proviso to s 41 of the SRA ('proviso') will bar Prestij's application for declaratory relief in this case. This is because Prestij is 'able to seek further relief than a mere declaration' within the meaning of the proviso by applying for leave of court and extension of time to file a JR application (for a certiorari order to quash Mr Pradhan's two appointments). Prestij had however failed to do so.

[48] In any event, s 41 of the SRA confers a discretion on the court to grant any declaration. I am not inclined to exercise my discretion pursuant to s 41 of the SRA to give the declarations sought for in Prestij's two OS for reasons which have been elaborated in the above Parts D–I.

A K. OUTCOME OF TWO APPLICATIONS (MR PRADHAN'S REPRESENTATIVE)

[49] Order 28 r 3B(1)(g), (h) and (4) of the RC provide as follows:

B *Dispute as to jurisdiction* (O 28, r 3B)

O 28 r 3B(1) *A defendant who wishes to dispute the jurisdiction of the Court in the proceedings* by reason of any irregularity in the originating summons or service thereof or in any order giving leave to serve the originating summons out of the jurisdiction or extending the validity of the originating summons for the purpose of service or on any other ground *shall, within twenty-one days after the service of the originating summons and supporting affidavit or affidavits on him, apply to the Court for —*

C

...

(g) *a declaration that in the circumstances of the case the Court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action*; *or*

D

(h) *such other relief as may be appropriate*.

...

(4) *On the hearing of an application under paragraph (1) or (2), the Court may make such order as it thinks fit* and may give such directions for its disposal as may be appropriate, including directions for the trial thereof as a preliminary issue. (Emphasis added.)

E

F **[50]** As explained in the above Part D, this court has no jurisdiction over Mr Pradhan with respect to the relief sought in Prestij's two OS. Hence, I grant the declarations prayed for in the two applications (Mr Pradhan's representative) pursuant to O 28 r 3B(1)(g) of the RC.

G **[51]** Additionally, premised on the reasons explained in the above Parts D–J, I am constrained to strike out Prestij's two OS against Mr Pradhan's representative on any one or more of the following grounds:

(a) Prestij's two OS against Mr Pradhan's representative are frivolous and/or vexatious as understood in O 18 r 19(1)(b) read with (3) of the RC; *and/or*

H

(b) Prestij's two OS against Mr Pradhan's representative constitute abuses of court process which should be struck out under:

(i) O 18 r 19(1)(d) read with (3) of the RC;

I

(ii) O 92 r 4 of the RC; and/or

(iii) the court's inherent jurisdiction and/or power.

[52] Prestij's learned counsel has cited a host of cases in support of Prestij's

two OS. With respect, all these cases can be easily distinguished on one or more of the grounds which have been explained in the above Parts D–J.

K(1). Are Prestij's solicitors liable personally for costs in this case?

[53] Order 59 r 6(1) of the RC provides as follows:

> 6 *Personal liability of solicitor for costs*
>
> (1) *Subject to the following provisions of this rule, where in any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default, the Court may make against any solicitor whom it considers to be responsible an order —*
>
> (a) disallowing the costs as between the solicitor and his client; and
>
> (b) directing the solicitor to repay to his client costs which the client has been ordered to pay to other parties to the proceedings; *or*
>
> (c) *directing the solicitor personally to indemnify such other parties against cost payable to them*. (Emphasis added.)

[54] Pursuant to O 59 r 6(1)(c) of the RC, the court has a discretion to order the solicitors of any party to pay costs to the opposing party — please refer to *Pacific Bunkers Pte Ltd v Owners of The Ships or Vessels 'Geniki Sarawak' and 'Geniki Johor' (No 2) and another case* [2015] 11 MLJ 145 at [69]–[71].

[55] I do not exercise my discretion under O 59 r 6(1)(c) of the RC to order Prestij's solicitors to indemnify the costs of Mr Pradhan's personal representative because:

(a) costs of this case had not been incurred improperly or without reasonable cause by Prestij's solicitors;

(b) costs of Prestij's two OS had not been wasted by undue delay caused by Prestij's solicitors; and

(c) Prestij's solicitors did not commit any misconduct or default which had wasted costs of this case.

K(2). Should Prestij pay costs on indemnity basis to Mr Pradhan's representative?

[56] I reproduce below O 59 r 16(2) and (4) of the RC:

> *Basis of assessment*
>
> O 59 r 16(1) ...
>
> (2) *Subject to the other provisions of these Rules, the amount of costs which any party are entitled to recover is the amount allowed after determination of costs on the standard basis* where —

A (a) an order is made that the costs of one party to proceedings be paid by another party to those proceedings;

(b) an order is made for the payment of costs out of any fund; or

(c) no order for costs is required,

B *unless it appears to the Court to be appropriate to order costs to be determined on the indemnity basis*.

...

(4) *On a determination of costs on the indemnity basis, all costs shall be allowed except* C *in so far as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Court may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party; and in these Rules, the term 'the indemnity basis', in relation to the determination of costs, shall be construed accordingly*. (Emphasis added.)

D

[57] As I have allowed the two applications (Mr Pradhan's representative), Prestij should pay costs to Mr Pradhan's representative in accordance with the general rule that 'costs to follow the event' (as provided in O 59 r 3(2) of the RC). The question that arises is whether the court should exercise its discretion E to order Prestij to pay costs to Mr Pradhan's representative on an indemnity basis pursuant to O 28 r 3B(1)(h) and (4) read with O 59 r 16(2) and (4) of the RC.

[58] It is not disputed that as a general rule, costs should be ordered to be F paid on a standard basis — please refer to O 59 r 16(2) of the RC. It is only in exceptional cases that the court orders a party in an OS to pay costs on an indemnity basis. Such an exceptional power is provided as follows:

(a) O 28 r 3B(1)(h) of the RC (*such other relief as may be appropriate*);

G (b) O 28 r 3B(4) of the RC (*the Court may make such order as it thinks fit*); and

(c) O 59 r 16(2) of the RC (*unless it appears to the Court to be appropriate to order costs to be determined on the indemnity basis*).

H

[59] It is my considered view that this is an exceptional case for me to exercise discretion to order Prestij to pay costs to Mr Pradhan's representative on an indemnity basis. This decision is premised on the following reasons:

(a) Prestij's two OS had only applied for declarations against Mr Pradhan. I Prestij did not seek for any court order to be satisfied personally by Mr Pradhan. At the first case management of Prestij's two OS, Mr Pradhan's learned counsel had informed the court and Prestij's learned counsel that Mr Pradhan would abide by any decision which would be made by the court ('Mr Pradhan's concession'). In view of Mr Pradhan's

concession, there is no necessity for Prestij's two OS to be continued against Mr Pradhan. However, despite Mr Pradhan's concession, Prestij's two OS against Mr Pradhan were not discontinued; and

(b) when Mr Pradhan passed on, Mr Pradhan's learned counsel again asked Prestij to reconsider Mr Pradhan's concession. If Prestij had accepted Mr Pradhan's concession, Mr Pradhan's representative need not be ordered by the court to be a substitute for Mr Pradhan in Prestij's two OS. Furthermore, Mr Pradhan's representative did not play any role in this case and cannot thereby assist the court in any manner. Regrettably, Prestij applied for and obtained an order for Mr Pradhan's representative to be a substitute for Mr Pradhan in Prestij's two OS.

L. DID TWO ADJUDICATORS HAVE JURISDICTION TO ADJUDICATE TWO ADJUDICATION PROCEEDINGS?

[60] I reproduce below ss 5, 15(b), (d), 24(c), 26 and 27(1) of the CIPAA:

s 5 *Payment claim*

(1) *An unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract.*

(2) *The payment claim shall be in writing and shall include —*

(a) *the amount claimed and due date for payment of the amount claimed*;

(b) *details to identify the cause of action including the provision in the construction contract to which the payment relates*;

(c) *description of the work or services to which the payment relates*; *and*

(d) *a statement that it is made under this Act.*

15 *Improperly procured adjudication decision*

An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

...

(b) *there has been a denial of natural justice*;

...

(d) *the adjudicator has acted in excess of his jurisdiction.*

24 *Duties and obligations of the adjudicator*

The adjudicator shall at the time of the acceptance of appointment as an adjudicator make a declaration in writing that —

...

(c) *he shall comply with the principles of natural justice*;

...

26 *Power of adjudicator not affected by non-compliance*

A (1) *Subject to subsection (2), the non-compliance by the parties with the provisions of this Act whether in respect of* time limit, form or *content or in any other respect shall be treated as an irregularity and shall not invalidate the power of the adjudicator to adjudicate the dispute nor nullify the adjudication proceedings or adjudication decision*.

(2) The adjudicator may on the ground that there has been non-compliance in B respect of the adjudication proceedings or document produced in the adjudication proceedings —

(a) set aside either wholly or partly the adjudication proceedings;

(b) make any order dealing with the adjudication proceedings as the adjudicator deems fit; or C

(c) allow amendment to be made to the document produced in the adjudication proceedings.

27 *Jurisdiction of adjudicator*

D (1) *Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6*. (Emphasis added.)

[61] Prestij's learned counsel has contended that two PC's have breached E s 5(2)(b) of the CIPAA by wrongly stating 'Clause 30.1 and Appendix to Clause 30.1 of the Articles of Agreement and Conditions of Building Contract (Private Edition Without Quantities — PAM Revised 2006)' ('PAM contract'). According to Prestij's learned counsel, in view of these two errors in the two PC's ('two errors'), the two adjudicators had no jurisdiction to F adjudicate the two adjudication proceedings under s 27(1) of the CIPAA. Prestij's learned counsel has relied on the Court of Appeal's judgment delivered by Mary Lim Thiam Suan JCA (as she then was) in *Ideal City Development Sdn Bhd v PWC Bina Sdn Bhd and other appeals* [2018] MLJU 1711; [2019] 2 CLJ 615.

G

[62] Firstly, with regard to the jurisdiction of an adjudicator to adjudicate an AC under CIPAA, it is decided in *Uzma Engineering Sdn Bhd v Khan Co Ltd and another summons* [2020] MLJU 1272, at [22], as follows:

[22] *I am of the following view*:

H (1) *according to s 2 of the CIPAA, CIPAA applies when the following four requirements (four requirements) are satisfied cumulatively —*

(a) *there is a 'construction contract' (defined in s 4 of the CIPAA to mean a 'construction work contract' and 'construction consultancy contract') between a claimant and respondent (first requirement). The first requirement is referred to in* I

(i) *the definitions of 'claimant', 'non-paying party', 'payment' and 'unpaid party' in s 4 of the CIPAA*; *and*

(ii) s 5(1) of the CIPAA;

(b) *the 'construction contract' is 'made in writing' (second requirement)*; A

(c) *the 'construction contract' relates to 'construction work'* (defined in s 4 of the CIPAA) *(third requirement)*; *and*

(d) *the 'construction work' is carried out wholly or partly within the territory in Malaysia (fourth requirement)*; B

(2) *even if all the four requirements are fulfilled, CIPAA does not apply in the following two circumstances —*

(a) *circumstances stipulated in s 3 of the CIPAA*; *or*

(b) *where a person, class of persons, contract, matter or transaction or class of contracts, matters or transactions has been exempted from the application of CIPAA under s 40 of the CIPAA by the 'Minister' (defined in s 4 of the CIPAA as the Minister charged with the responsibility for works)*; C

... (Emphasis added.)

D

[63] I am satisfied that the two adjudicators had jurisdiction to adjudicate the two adjudication proceedings because:

(a) all the four requirements stipulated in s 2 of the CIPAA had been fulfilled with regard to the two adjudication proceedings. It is to be noted that Prestij has issued a 'Letter of Award' dated 15 June 2017 which appointed Quzen as a subcontractor to do 'construction work' ('LA (Quzen)') while by way of a 'Letter of Appointment' dated 31 May 2017, PME had been appointed by Prestij to perform construction work ('LA (PME)'). I shall refer in this judgment to LA (Quzen) and LA (PME) as the 'two subcontracts'; E F

(b) the circumstances stated in s 3 of the CIPAA did not apply to the two adjudication proceedings; and

(c) Prestij, Quzen, PME and the two subcontracts had not been exempted from the application of CIPAA under s 40 of the CIPAA by the Minister of Works. G

[64] In *Ideal City Development*, at [20]–[21] and [50]–[54], the cause of action for the respondent's claim based on the construction contract in that case, had not accrued. Hence, the respondent in *Ideal City Development* could not serve a valid PC on the appellant and the adjudicator in question had no jurisdiction to adjudicate the respondent's pre-mature adjudication claim. There is nothing in *Ideal City Development* which has decided that if a PC does not comply with s 5(2)(a)–(d) of the CIPAA, an adjudicator has no jurisdiction to adjudicate the PC. H I

[65] I am of the view that Prestij cannot rely on the two errors to deprive the adjudicators of their jurisdiction to adjudicate the two AC's. This decision is premised on the following reasons:

(a) the contents of the two PC's have sufficient details to disclose valid causes of action which Quzen and PME have against Prestij based on the two subcontracts. As such, *Ideal City Development* can be easily distinguished from the two adjudication proceedings;

(b) the two subcontracts have provided for the application of PAM contract. In other words, PAM contract applied to Prestij, Quzen and PME. The two errors merely concerned the wrong provision of PAM contract which was applicable in the two PC's;

(c) Prestij was not prejudiced in any manner by the two errors because:

(i) Prestij was able to serve on Quzen and PME in the two adjudication proceedings two 'Payment Responses' under s 6(2) of the CIPAA ('two PR's'); and

(ii) an 'Adjudication Response' was served by Prestij pursuant to s 10(1) of the CIPAA in the two adjudication proceedings ('two AR's').

(d) according to s 26(1) of the CIPAA, any non-compliance with s 5(2)(b) of the CIPAA with regard to the two errors 'shall be treated as an irregularity and shall not invalidate the power of the (two adjudicators) to adjudicate the dispute (two AC's) nor nullify the (two adjudication proceedings) or (two AD's)'; and

(e) the object of CIPAA ('object (CIPAA)') is to ensure that parties who perform construction work are not deprived of cash flow (the life-blood of the construction industry) — please see the Long Title to CIPAA (CIPAA is to 'facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide for remedies for the recovery of payment in the construction industry') and the judgment of the Federal Court delivered by Mohd Zawawi Salleh FCJ in *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2020] 6 MLJ 224; [2019] 5 AMR 516 at [51]. If I have accepted the submission by Prestij's learned counsel regarding the two errors, this will defeat the object (CIPAA).

M. WHETHER TWO ADJUDICATORS HAD EXCEEDED THEIR JURISDICTION IN TWO ADJUDICATION PROCEEDINGS

[66] By reason of s 27(1) of the CIPAA, the jurisdiction of the two adjudicators to adjudicate the two adjudication proceedings was limited to matters raised in:

(a) the two PC's (as understood in s 5(1) and (2)(a)–(d) of the CIPAA); and

(b) the two PR's (within the meaning of s 6(2) of the CIPAA).

[67] In this case, the two adjudicators had not exceeded their jurisdiction because they did not decide on any matter beyond the two PC's or two PR's. Accordingly, there is no basis for this court to set aside the two AD's under s 15(d) read with s 27(1) of the CIPAA.

N. DID TWO ADJUDICATORS BREACH SECOND RULE IN TWO ADJUDICATION PROCEEDINGS?

[68] Prestij's learned counsel has submitted that there is a breach of the second rule by the two adjudicators because they have failed to consider in their two AD's all the contentions raised by Prestij in the two adjudication proceedings. Reliance has been placed on a judgment delivered by Zulkefli PCA in the Federal Court case of *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22; [2019] 5 CLJ 479.

[69] Firstly, *View Esteem,* at [65]–[66] and [74], has decided that an adjudicator would have breached the second rule if the adjudicator did not consider a *defence* raised in the adjudication proceedings. *View Esteem* did not however decide that an adjudicator must address each and every *submission* made by parties in the AD. This is understandable because by virtue of s 12(2)(a)–(c) of the CIPAA, an adjudicator has to deliver an adjudication decision within a tight timeline. Furthermore, the object (CIPAA) can only be attained if adjudicators deliver AD's expeditiously so as to ensure that parties who perform construction work are not deprived of cash flow in the form of payment for their construction work.

[70] I have perused the two PR's and two AR's. In the two AD's, the two adjudicators had considered in essence all the defences raised by Prestij in the two adjudication proceedings. There is thus no breach of the second rule as explained in *View Esteem*.

[71] Before the delivery of the two AD's, the two adjudicators had not deprived Prestij of its right to adduce any evidence and to submit on all the questions which arose in the two adjudication proceedings — please see the decision of David Wong Dak Wah JCA (as he then was) in the Court of Appeal case of *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016] MLJU 1776 at [20].

N(1). Should the court set aside two AD's under s 15(b) of the CIPAA?

[72] Even if it is assumed that the two adjudicators had breached the second rule ('alleged breaches (second rule)'):

(a) there is no 'real possibility' that without the alleged breaches (second rule), the two adjudicators would have reached a different decision — please refer to the judgment of the Court of Appeal delivered by Harmindar Singh JCA (as he then was) in *Guangxi Dev & Cap Sdn Bhd v Sycal Bhd* [2018] MLJU 1542; [2019] 1 CLJ 592 at [32]; and

(b) there is no evidence adduced by Prestij to show that the alleged breaches (second rule) are 'decisive' or 'material' to the two AD's which warrants the court to set aside the two AD's pursuant to ss 15(b) and 24(c) of the CIPAA — please see the judgment of Mary Lim Thiam Suan J (as she then was) in the High Court in *Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals* [2015] MLJU 1873; [2015] 1 LNS 1435, at [82].

Premised on the above reasons, even the alleged breaches (second rule) had occurred in the two adjudication proceedings, I am not inclined to set aside the two AD's pursuant to s 15(b) of the CIPAA.

O. WHETHER THE COURT CAN REVIEW TWO AD'S UNDER S 15 OF THE CIPAA

[73] The court's power to set aside an AD under s 15 of the CIPAA has been explained in *Naza Engineering & Construction Sdn Bhd v SSL Dev Sdn Bhd* [2020] 9 MLJ 499 at [14], as follows:

> [14] *My understanding of the court's power to set aside an AD is as follows*:
>
> (1) *CIPAA does not provide a right to any party to an AD to appeal against the AD*;
>
> (2) *an AD is provisional under s 13(a)–(c) of the CIPAA and may be set aside by the High Court pursuant to any of the paragraphs in s 15(a)–(d) of the CIPAA (setting aside application). A setting aside application is not an appeal to the High Court against the AD. Nor is a setting aside application a judicial review of the AD. Hence, the High Court cannot review the merits of an AD in a setting aside application — please see the Court of Appeal's judgment delivered by David Wong Dak Wah JCA (as he then was) in ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd & another appeal* [2016] MLJU 1776, at [21];
>
> ...;
>
> (4) *the court cannot set aside an AD merely because —*
>
> (a) *an error of law has been committed by an adjudicator unless the adjudicator has answered a 'wrong' question of law (which does not arise from the dispute to be adjudicated upon) — please see the judgment of Lee Swee Seng J (as he then was) in the High Court in Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd & another case* [2017] 7 MLJ 732; [2016] 5 CLJ 882 *at [71]*;
>
> (b) *an adjudicator has interpreted erroneously a provision in the construction contract — Econpile*, at [67];
>
> (c) *relevant evidence has been excluded wrongly by an adjudicator*;

(d) *an adjudicator has admitted improperly irrelevant evidence*; A

(e) *an adjudicator has failed to attach weight to relevant evidence, oral or documentary*;

(f) *undue weight has been given by an adjudicator to any piece of evidence*;

(g) *an adjudicator has assessed erroneously the evidence presented to the adjudicator*; B

(h) *documentary evidence has been misconstrued by an adjudicator*;

(i) *a plain error regarding a finding of fact has been made by an adjudicator*;

(j) *an adjudicator has omitted to make a finding of fact which can be adequately supported by evidence*; C

(k) *an erroneous finding of mixed fact and law has been arrived at by an adjudicator — please see Lee Swee Seng J's decision in the High Court in Syarikat Bina Darul Aman Bhd & Anor v Government of Malaysia* [2017] 4 AMR 477, at [60]; D

(l) *an adjudicator has drawn a wrong inference from the evidence; and*

(m) *an adjudicator has omitted to make the right inference from the evidence.*

The above errors and omission by an adjudicator may be rectified by an arbitration or litigation regarding the dispute in question (as provided in s 13(c) of the CIPAA) — Econpile, at [67]; ... (Emphasis added.) E

[74] Prestij's learned counsel has presented a litany of errors and omission in Mr Loh's AD, including an allegation that Mr Loh had failed to consider Quzen's 'fraudulent act in submitting fabricated documents' to Mr Loh ('forgery allegation'). F

[75] Firstly, based on *NAZA Engineering & Construction*, the court cannot review the two AD's based on any error or omission in the two AD's which do not fall within s 15(a)–(d) of the CIPAA ('errors/omission'). The two subcontracts have arbitration clauses (cl 34.5 of PAM contract). By virtue of s 13(c) of the CIPAA, the two AD's are 'temporarily final' and are subject to arbitration between Prestij on the one part and Quzen and PME on the other part ('two arbitrations'). As explained in *NAZA Engineering & Construction*, the errors/omission can be remedied in the two arbitrations. G H

[76] Regarding the forgery allegation, it is decided in *Otis Elevator Company (M) Sdn Bhd v Castmet Sdn Bhd and another case* [2020] MLJU 2306; [2020] AMEJ 1769 at [22], as follows: I

[22] *I am of the view that if an adjudicator has jurisdiction to adjudicate a dispute under CIPAA (please see the above para 16), the fact that one party alleges forgery regarding a document (forgery allegation), does not deprive the adjudicator of jurisdiction to adjudicate the dispute. If otherwise, a 'non-paying party' (as defined in s 4*

CIPAA) may easily defeat the object (CIPAA) and circumvent the application of CIPAA by raising a forgery allegation in an adjudication. There are two other reasons why I am not able to accept the above contention by Mr. Andrew Chan. These two reasons are:

(1) *an adjudicator has powers under s 12(1) read with 25(b), (d), (e), (h), (i), (k), (l), (m) and (n) of the CIPAA to determine a forgery allegation; and*

(2) *any decision by an adjudicator with respect to the forgery allegation is only 'temporarily final' according to s 13(c) of the CIPAA. Hence, even if it is assumed that an adjudicator has erred regarding the forgery allegation, such an error can be corrected by subsequent litigation or arbitration between the parties (whichever the case may be)*. (Emphasis added.)

P. SHOULD THE COURT GRANT PRESTIJ'S FORTUNA INJUNCTION APPLICATION (QUZEN)?

[77] An AD may be a basis for the presentation of a winding up petition — please refer to the judgment of the Court of Appeal delivered by Abang Iskandar JCA (as he then was) in *Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd* [2019] 3 MLJ 244, at [16]–[17] and [20]–[22].

[78] The court has a discretion under ss 50 and 51(2) of the SRA to grant Prestij's Fortuna injunction application (Quzen). It is decided in *Kurniaan Maju Sdn Bhd v HSA Setiamurni Sdn Bhd* [2020] 9 MLJ 103 at [20], as follows:

[20] *I am of the view that the court has a discretionary power to grant a Fortuna Injunction notwithstanding the fact that the Stay Application has been dismissed. This is because the purpose of a Fortuna Injunction is distinct from the court's power to stay an AD under s 16(1)(a) and (b) of the CIPAA .*

In the Court of Appeal case of Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd [2007] 2 CLJ 305, at [7], Gopal Sri Ram JCA (as he then was) has explained the basis for the court to grant a Fortuna Injunction. According to Tan Kok Tong, a Fortuna Injunction is granted to a plaintiff company to restrain a defendant from presenting a winding up petition against the plaintiff company so as to prevent an abuse of court process by the defendant's filing of the winding up petition against the plaintiff company. (Emphasis added.)

The appeal to the Court of Appeal against the above decision in *Kurniaan Maju* has been withdrawn.

[79] I am not able to allow Prestij's Fortuna injunction application (Quzen) for reasons which have been given in *Kurniaan Maju*, at [25], as follows:

[25] *In this case, the court is unable to exercise its discretion under ss 50 and 51(2) of the SRA to grant a perpetual Fortuna Injunction to restrain the Defendant from presenting a winding up petition against the Plaintiff. This decision is based on the following reasons*:

(1) *as decided in Likas Bay Precinct, by reason of the AD (which is not challenged by the Plaintiff), the Defendant is a 'creditor' of the Plaintiff within the meaning of s 464(1)(b) (Companies Act 2016) and is thereby entitled to present a winding up petition against the Plaintiff under s 465(1)(e) (Companies Act 2016); and*

(2) *the Defendant's exercise of its statutory rights under ss 464(1)(b) and 465(1)(e) (Companies Act 2016) cannot amount to an abuse of court process. Accordingly, there is no basis for this court to issue a perpetual Fortuna Injunction in the Plaintiff's favour*. (Emphasis added.)

[80] This court's refusal to accede to Prestij's Fortuna injunction application (Quzen) is fortified by the grounds explained in the above Parts L–O (why I am not able to set aside the two AD's).

Q. WHETHER THE COURT SHOULD ALLOW TWO AD'S TO BE ENFORCED AGAINST PRESTIJ

[81] Section 28(1) and (2) of the CIPAA provide as follows:

28 *Enforcement of adjudication decision as judgment*

(1) *A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court*.

(2) *The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable*. (Emphasis added.)

[82] In *Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd* [2019] 2 MLJ 362; [2019] 2 CLJ 229 at [24]–[26], Mary Lim Thiam Suan JCA (as she then was) has explained in the Court of Appeal that the court may exercise its discretion to grant leave under s 28(1) and (2) of the CIPAA to enforce an adjudication decision if the following three conditions are fulfilled:

(a) the adjudication decision has been made in favour of the party applying for leave;

(b) the party against whom an adjudication decision has been made, has failed to pay the adjudicated amount on the date specified in the adjudication decision; and

(c) there is no prohibition on the court's discretionary power to grant leave to enforce the adjudication decision.

('three conditions (enforcement)').

[83] I have no hesitation to decide that the three conditions (enforcement) have been satisfied in respect of Quzen's OS and PME's OS (collectively referred to in this judgment as the 'two enforcement OS'). Hence, this court allows the two enforcement OS.

R. THE COURT'S DECISION

[84] In summary:

(a) the court does not have any 'jurisdiction' and/or 'power' under any AP within the meaning of art 121(1) of the FC to implement and/or enforce HCA (2013);

(b) HCA (2013) cannot be enforced by court when HCA (2013) has not been enacted by Parliament as an AP;

(c) Mr Pradhan had immunity from Prestij's two suits under:

(i) s 34(1) of the CIPAA; *and/or*

(ii) reg 3A(2) KLRCAR read with s 3(1) of the DPA and article 31.1, when he appointed the two adjudicators;

(d) Prestij has not adduced any evidence to rebut the four rebuttable presumptions under s 114(e) of the EA that:

(i) the government had 'regularly' appointed Mr Pradhan as the acting director and director; and

(ii) Mr Pradhan had 'regularly' appointed the two adjudicators;

(e) even if there are defects in Mr Pradhan's two appointments, such defects cannot invalidate Mr Pradhan's appointment of the two adjudicators according to s 41(a) of the IA;

(f) Prestij's two OS have abused court process by circumventing the two mandatory requirements (JR application);

(g) the court cannot grant the declarations applied for by Prestij under s 41 of the SRA because:

(i) Prestij has no legal entitlement regarding Mr Pradhan's two appointments; and

(ii) Prestij is barred by the proviso on the ground that Prestij should have applied for leave of court and extension of time to file a JR application for a certiorari order to quash Mr Pradhan's two appointments;

(h) the court allows the two applications (Mr Pradhan's representative) with the following orders:

(i) the court grants declarations that the court has no jurisdiction over Mr Pradhan with respect to the relief sought in Prestij's two OS; and

(ii) Prestij's two OS against Mr Pradhan's representative are struck out with costs to be paid by Prestij (not Prestij's solicitors) to Mr Pradhan's representative on an indemnity basis according to O 28 r 3B(1)(h) and (4) read with O 59 r 16(2) and (4) of the RC;

(i) the two adjudicators had jurisdiction under CIPAA to adjudicate the two adjudication proceedings;

(j) the two PC's have breached s 5(2)(b) of the CIPAA but in view of s 26(1) of the CIPAA, such breaches cannot invalidate the two adjudication proceedings and two AD's;

(k) the two adjudicators had adjudicated on matters raised in the two PC's and two PR's. Hence, the two adjudicators did not exceed their jurisdiction as understood in s 15(d) read with s 27(1) of the CIPAA;

(l) the two adjudicators had not breached the second rule within the meaning of ss 15(b) and 24(c) of the CIPAA. The second rule does not require the two adjudicators to consider and decide in the two AD's all the contentions advanced by Prestij in the two adjudication proceedings;

(m) the court cannot exercise its discretion under ss 50 and 51(2) of the SRA to grant Prestij's Fortuna injunction application (Quzen); and

(n) the court grants leave under s 28(2) of the CIPAA for the two AD's to be enforced against Prestij.

[85] Premised on the above evidence and reasons:

(a) the two applications (Mr Pradhan's representative) are allowed with costs to be paid by Prestij on an indemnity basis to Mr Pradhan's representative;

(b) Prestij's two OS against the government, Quzen and PME are dismissed with costs;

(c) the two enforcement OS are allowed with costs; and

(d) Prestij shall pay costs on a standard basis to:

(i) the government regarding Prestij's two OS;

(ii) Quzen with respect to Prestij's OS (Quzen) and Quzen's OS; and

(iii) PME with regard to Prestij's OS (PME) and PME's OS.

Order accordingly.

Reported by K Selvaraju